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No. 03-701

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICI CURIAE* OF THE HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a roadside ditch fronting the Deaton's 12-acre property is a "navigable water" such that the Deatons violated the federal Clean Water Act by not obtaining a permit from the United States Army Corps of Engineers before placing dirt in a wetland adjacent to the ditch.

TABLE OF CONTENTS

		Page
QUESTION PRESENTED		i
I.	INTEREST OF THE *AMICUS CURIAE*	1
II.	REASONS FOR GRANTING THE PETITION FOR CERTIORARI AND SUMMARY OF THE ARGUMENT	5
	A. The Interpretation of "Waters of the United States" Has a Direct Effect on the Affordable Housing in Arizona	5
	B. The Reach of the Federal Clean Water Act, Even as it is Delegated to the States, Should be Limited	9
III.	ARGUMENT: THE *DEATON* TRIBUTARY RULE IMPROPERLY EXTENDS JURISDICTION OVER DRAINAGE FEATURES THAT LACK A SIGNIFICANT NEXUS TO NAVIGABLE WATERS	10
	A. The *Deaton* Tributary Rule is Based on the Theory that Congress Intended to Regulate to the Limits of its Authority Under the Commerce Clause	10
	B. The Current Rule Impermissibly Continues to Regulate All Tributaries, Regardless of their Relationship to Downstream Navigable Waters	14
	C. Pollution Emanating from Ditches can be Controlled Without the Application of the Tributary Rule	15
IV.	CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468 (1963) 2

Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001) 14

Natural Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) 10, 11, 12

Puerto Rico v. Alexander, 438 F. Supp. 90 (D.D.C. 1977) 16

Sierra Club v. Abston Construction, 620 F.2d 41 (5th Cir. 1980) 16

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 121 S.Ct. 675 (2001) 10, 11, 14, 15, 18

United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974) 15

United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) 9, 14

United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974) 16

United States v. Morrison, 529 U.S. 598, 120 S.Ct. 1740 (2000) 9

STATUTES

33 U.S.C. § 1342 2

33 U.S.C. § 1344 2

33 U.S.C. § 1362(7) 2

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. §§ 1251-1387 1

42 U.S.C §§ 6901-6992k 17

ARIZ. REV. STAT. § 49-241(A) 17

ARIZ. REV. STAT. ANN. § 41-3953(A) (2003) 6

ARIZ. REV. STAT. ANN. § 41-3954(A) 6

ARIZ. REV. STAT. ANN. § 41-3954(B)(1) 6

ARIZ. REV. STAT. ANN. § 49-201.12 17

ARIZ. REV. STAT. ANN. § 49-255.01 (2003) 4

OTHER AUTHORITIES

2001 ARIZ. SESS. LAWS Ch. 22, §§ 18, 22 6

REGULATIONS

33 C.F.R. § 331.7(g) 3

33 C.F.R. § 323.3(a)(5) (1982) 14

33 C.F.R. § 328.3(a) 2

37 Fed. Reg. 18289 (Sept. 9, 1972) 12

38 Fed. Reg. 13528 (May 22, 1973) 12

39 Fed. Reg. 12115 (April 3, 1974) 12

40 Fed. Reg. 19766 (May 6, 1975) 12, 13

40 Fed. Reg. 31320, 31323-24 (July 25, 1975) 13

42 Fed. Reg. 37122, 37144 (July 19, 1977) 2, 13

43 Fed. Reg. 37078 (August 21, 1978) 13, 14

44 Fed. Reg. 32854, 32901 (June 7, 1979) 14

55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) 16

I. INTEREST OF THE *AMICUS CURIAE*[1]

The Home Builders Association of Central Arizona (HBACA) is a non-profit corporation organized under the laws of the State of Arizona, formed in 1951 to provide a means for businesses in the housing and real estate industries in central Arizona to address issues and concerns relating to those industries. Under its association with the National Home Builders Association, HBACA is authorized to represent constituent members in the Arizona counties of Maricopa, Pinal, Apache, Navajo, Gila, Graham, Greenlee, Cochise, Yavapai, Yuma and La Paz. This represents a vast territory within Arizona, and very diverse conditions relating to the availability of water, the topography of natural drainage, the types of artificial and man-made drainage, and the definition of "waters of the United States."

Our members are heavily regulated under the Clean Water Act[2] and therefore are directly affected by court decisions such as the instant case. The Clean Water Act establishes two regulatory permitting programs for discharges to "navigable waters" that govern activities of our members. Section 404 requires a permit for the discharge of dredged or fill material and is administered by the U.S.

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[1] Pursuant to Rule 37.6, Rules of the Supreme Court, counsel for *amicus curiae* Home Builders Association of Central Arizona state that they authored this brief in whole. No person or entity other than *amicus curiae* has made a monetary contribution for preparation or submission of this brief.

[2] Also known as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387.

Army Corps of Engineers (Corps), with oversight by the U.S. Environmental Protection Agency (EPA). Section 402, also called the National Pollutant Discharge Elimination System (NPDES) program, requires a permit for discharge of pollutants (other than dredged or fill material) and is administered by EPA. 33 U.S.C. § 1344; *id.*, § 1342. Under the statute, the term "navigable waters" is defined as "waters of the United States" which is in turn expansively defined by regulation to include all traditional navigable waters, tributaries and impoundments.[3] The tributary rule, at issue here, is the most expansive part of the current regulatory definition. It provides that a tributary of a traditional navigable water is in itself a "navigable water" under the Act and includes not just direct (or primary) tributaries but all secondary, tertiary and higher order tributaries to the limit of the tributary system.[4]

Because of this expansive definition, particularly through the application of the tributary rule, even the smallest ephemeral drainages and ditches are considered "waters of the United States" because they drain to larger waters that eventually drain into the sole traditional navigable water in Arizona, the Colorado River.[5] The Administrative appeal decisions of the Corps of Engineers South Pacific Division, which includes Arizona, illustrate the broad jurisdictional reach of the term "navigable

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[3] 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a).

[4] 42 Fed. Reg. 37122, 37144 (July 19, 1977).

[5] Almost the entire State of Arizona lies within the Colorado River Basin. *See Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468 (1963).

waters" as currently applied in Arizona.[6] In one case, the Corps asserted jurisdiction over a desert wash in Buckeye, Arizona, 2400 feet from its point of origin below a regional flood control structure. *See* U.S. Army Corps of Engineers South Pacific Division Administrative Appeal Decision, *Approved Jurisdictional Determination for Desert Moon Shadows Estates*, 2 (July 11, 2002). The basis for the delineation was in part that the wash eventually connected to an irrigation canal, which was tributary to the Hassayampa River, which the parties agreed was subject to Corps' jurisdiction. *Id.*

In another instance, the Corps asserted jurisdiction over a desert wash across private property in Tucson, based on the wash's connection through a series of downstream washes to the Rillito River, a tributary to the Santa Cruz River, which is tributary to the Gila River, which is in turn tributary to the Colorado River. The delineation included a one foot wide channel as jurisdictional. *Id.*, *Approved Jurisdictional Determination for the Sunrise Office Park*, 3 (September 7, 2001).[7] In a third example, the Corps delineated a cattle stock water tank based on a historic connection that no longer existed. In Arizona, stock tanks are typically constructed in low areas of natural drainage to capture runoff. As such, they would be considered "impoundments" of a tributary of a navigable

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[6] The appeals are conducted pursuant to 33 C.F.R. Part 331. Decisions are published at the Corps' South Pacific Division website at http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/index.htm. The decisions themselves do not have precedential effect and are being cited here only for illustrative purposes. 33 C.F.R. § 331.7(g).

[7] Published at the Corps South Pacific Division website at: http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/index.htm.

water, making the tank itself, under current Corps' policy, a navigable water regulated under the Act. *See id.*, *Approved Geographic Jurisdiction of the Valley Vista Property* 2-3 (January 31, 2003).[8]

In Arizona, land development often involves grading and rerouting of natural and man-made drainages that the Corps and EPA consider "waters of the United States." Reshaping of these drainage areas typically results in discharges of fill material requiring a permit under Section 404 of the Clean Water Act. The permit process imposes substantial burdens. Under EPA Guidelines, all discharges to waters of the United States must be avoided to the extent practicable. Discharges that are permitted must be mitigated to replace lost "functions and values" of the impacted waters and to ensure "no net loss" of such waters. The permit process is expensive and time-consuming.

Similarly, discharge of storm water from construction sites to waters of the United States requires a permit under Section 402 of the Clean Water Act, also known as the "National Pollutant Discharge Elimination System" or "NPDES" program. The State of Arizona has established statutory authority to administer the Arizona Pollution Discharge Elimination System (AZPDES) program[9] and this program and has received EPA-approval and so operates in lieu of the federal program. The scope and geographic reach of the program is the same as its federal

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[8] The appeal decision rejected the pre-Clean Water Act tributary connection as a basis for jurisdiction and remanded to the Corps for further action. There was no question that if the tributary connection existed, that the tank would be considered a "navigable water." *Id.* at 4.

[9] ARIZ. REV. STAT. ANN. § 49-255.01 (2003).

counterpart. The goal of the program is to control pollutants generated by construction sites and prevent them from reaching navigable waters. It is equally critical to determine the geographic scope of waters of the United States in this context because our members are required to develop storm water best management practices to control pollutants *before* they reach the regulated waters.

Aside from construction issues, HBACA is also uniquely interested in the social policy of affordable housing in the State of Arizona. The ability to construct housing in a cost effective manner increases the market, which is in the interest of the home building industry, but HBACA's interest goes beyond that.

At the retail homebuyer level, HBACA is closer to the issue of affordability than most governmental agencies. Too often, when issues of growth and development are being discussed at the policy level, the need for affordable housing is overlooked. Policy level decision-makers are not typically affected by lack of affordable housing. Yet these policy decisions directly affect housing affordability.

Any law that affects the cost of housing in Arizona affects HBACA. The definition of waters of the United States at issue in this case is such a law.

II. REASONS FOR GRANTING THE PETITION FOR CERTIORARI AND SUMMARY OF THE ARGUMENT

A. The Interpretation of "Waters of the United States" Has a Direct Effect on the Affordable Housing in Arizona

In Arizona, the question of affordable housing has raised sufficient concern at the state level to create the

Arizona Department of Housing[10] and the Arizona Housing Commission.[11] Jointly, these entities have undertaken to study affordable housing issues in Arizona and prepare a report on the subject. The report, entitled *Affordable Housing Profile*, studies the affordable housing "gap" between Arizona households seeking housing and the number of available units.[12] It describes this concept as follows:

> One of the primary objectives of this study is to identify the "affordability gap" for the State. The "gap" is the difference between the number of households within each income range and the number of housing units affordable to those households. It typically occurs at the lower end of the income range where there are more households than affordable units. For these households to find housing in the community, they must pay more than

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[10] The Arizona Department of Housing was created in 2001 and became operational on October 1, 2002. 2001 ARIZ. SESS. LAWS Ch. 22, §§ 18, 22. It is an agency of the State of Arizona, authorized by statute to "address the affordable housing issues confronting this state. . . . " ARIZ. REV. STAT. ANN. § 41-3953(A) (2003). The agency's official website is http://www.housingaz.com.

[11] The Arizona Housing Commission is an advisory commission also created by Arizona to "recommend housing strategic planning and policy." ARIZ. REV. STAT. ANN. § 41-3954(B)(1). The members include rural and non-rural representatives, one member of a tribal government, one member of a tribal housing department, and various other interests groups. *See id.*, § 41-3954(A).

[12] Arizona Housing Commission, Arizona Department of Housing, *Arizona Affordable Housing Profile, Findings and Conclusions* (2002). The report is available on the Arizona Department of Housing website. *See* note 10, *ante*. The report notes that "Arizona is the first state to commission a profile of this kind." *Id.* at p. i.

> 28% of their income toward shelter or live in sub-standard and/or over-crowded conditions.[13]

The report summarizes that, as of 2000, the total affordability gap for the State of Arizona "is estimated at 194,700 households or about 10.3 percent of all households including those on Native American reservations. . . . [C]ertain counties, such as Coconino, Santa Cruz and Yavapai, have affordability gaps higher than 15%."[14]

Importantly, the report also concludes:

> Each community's housing needs are different and individual solutions and strategies must be tailored to the particular situation.[15]

This element of affordable housing – local community differences and the need for local solutions – relates directly to the need for clarification of federal regulatory control over land use planning at the local level.

In examining the cost of housing in Arizona, the Arizona Housing Commission also prepared a report entitled *The State of Housing in Arizona*.[16] This report focuses on the reasons for high housing costs and the concomitant lack of affordable housing. It identifies six factors contributing to the price of a home: Construction material and labor (50-55%); land acquisition and site

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[13] *Id.* at 1.

[14] *Id.*

[15] *Id.* at 2.

[16] Arizona Housing Commission, *The State of Housing in Arizona* (2000). This report is available on the State of Arizona Department of Housing web page, http://www.housingaz.com/hc/default.asp.

improvement costs (20-24%), builder overhead (12-14%), government fees (8-10%), builder profit (3-5%), and city, county and state sales taxes (3%).[17]

Significantly, "the most frequently mentioned barrier to affordability within the construction process was the limited amount of land for private development."[18] The report notes that, while almost half of the land in the State of California is privately held, only 17% of the land in Arizona is in private hands. The remainder is in public ownership.[19] As to this issue of lack of land, the report concludes that the influence of government on this barrier to housing affordability is "pervasive," ranging from public land policies and open space requirements to zoning and taxation.[20]

In Arizona, restrictions on the use of land are particularly acute. These restrictions translate into increased housing costs. It is an issue of local concern, and it demonstrates the wisdom of Congress in limiting the reach of federal land use planning to issues of truly national concern. As discussed in the next section, interpretation of the Clean Water Act should preserve the ability to deal with issues of local concern at the state and community level.

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[17] *Id.* at 32-33.

[18] *Id.* at 37.

[19] 27% is held in Indian reservation status. The Federal Government owns an additional 42%, administered by the Bureau of Land Management, the Bureau of Reclamation, the National Park Service, the National Forest Service and other federal agencies. The State of Arizona owns 14%. *Id.* at 18.

[20] *Id.* at 37.

B. The Reach of the Federal Clean Water Act, Even as it is Delegated to the States, Should be Limited

As noted in *United States v. Morrison*, 529 U.S. 598, 617-18, 120 S.Ct. 1740, 1754 (2000), "[t]he Constitution requires a distinction between what is truly national and what is truly local." These words speak well to the issue of defining "waters of the United States" in terms that extend the reach of the federal permitting programs under the Clean Water Act. Permitting at the federal level is cumbersome, expensive and time consuming. It is necessary when national issues are at stake, but it is inappropriate when federal permitting requirements operate to displace local authority, and responsibility, for insuring the local welfare.

In this case, the United States Army Corps of Engineers has asserted jurisdiction over a wetland on private property because the wetland is adjacent to a drainage ditch deemed to be within the definition of "waters of the United States." The United States Court of Appeals for the Fourth Circuit has affirmed this jurisdictional authority, fundamentally on the principle that water finding its way into the drainage ditch will "eventually flow" into waters that are undeniably waters of the United States.[21] Because of this eventual flow, the ditch itself becomes subject to the Clean Water Act.

This definitional rule should not pass constitutional scrutiny under *Morrison, supra*, because it knows no bounds between issues of national or local concern. As has been pointed out in the briefs filed to date in support of issuing a writ of certiorari, every gutter, curb, and storm

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[21] *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003).

drain in the United States arguably meets this test. In Arizona, every small ephemeral wash, stock tank and irrigation drainage ditch will likely meet this test, and there are a great many small ephemeral washes, stock tanks and irrigation drainage ditches in Arizona that will, in turn, affect the affordability of housing through pervasive, and unnecessary, federal involvement.

For the reasons discussed in the next section, the rule adopted by the Court of Appeals for the Fourth Circuit is legally erroneous and should be reversed. A more moderate approach to federal land use control should be adopted.

III. ARGUMENT: THE *DEATON* TRIBUTARY RULE IMPROPERLY EXTENDS JURISDICTION OVER DRAINAGE FEATURES THAT LACK A SIGNIFICANT NEXUS TO NAVIGABLE WATERS

A. The *Deaton* Tributary Rule is Based on the Theory that Congress Intended to Regulate to the Limits of its Authority Under the Commerce Clause

Prior to *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"),[22] the general view of EPA and the Corps regarding the scope of their jurisdiction under the Clean Water Act was that, by leaving out the word "navigable," Congress intended to regulate all waters that could be reached through Congress' plenary authority over interstate commerce. *See Natural Resources Defense Council v.*

[22] 531 U.S. 159, 121 S.Ct. 675 (2001).

Callaway (*NRDC*).[23] This view was unequivocally rejected by this Court in *SWANCC:* "We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. . . . .The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[24] Yet the tributary rule as now promulgated continues to rest on the faulty presumption of this expansive jurisdiction.

Soon after the adoption of the Clean Water Act in 1972, EPA began developing regulations to define "waters of the United States." EPA's General Counsel viewed the deletion of the word "navigable" from the definition of "waters of the United States" as "significant":

> The [legislative history] indicates that the new definition of "navigable waters" is to "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[25]

Counsel then opined on the types of waters that would be regulated and included both navigable waters and tributaries of navigable waters in the list.[26] Later that

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[23] 392 F. Supp. 685, 686 (D.D.C. 1975).

[24] 531 U.S. at 172.

[25] EPA General Counsel Opinion (Feb. 6, 1973), *quoting* S. Rept. No. 92-1236 at 144.

[26] *Id.*

same year, EPA issued its regulations defining "waters of the United States" and, in apparent reliance on the counsel's opinion, included "[t]ributaries of navigable waters of the United States" as a category of jurisdictional waters.[27]

In its initial rulemakings, the Corps defined "navigable waters of the United States" in its regulations without reference to tributaries.[28] The 1974 revisions to the definition of "navigable waters" more fully addressed the Clean Water Act amendments, but still made no reference to tributaries.[29] This interpretation was challenged in *NRDC, supra.* In *NRDC*, the court held that Congress intended to assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution" and that the term "navigable waters" was "not limited to the traditional tests of navigability."[30] The court therefore held that the Corps' limited exercise of jurisdiction was unlawful.

Within weeks of the *Callaway* decision, the Corps' proposed regulations on how to define "waters of the United States."[31] The Corps proposed two basic alternatives for regulating tributaries. The first would regulate "all navigable waters up to their headwaters and all tributaries of navigable waters up to their headwaters." The second, less expansive definition (and the one favored by the Corps) would regulate all navigable waters up to

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[27] 38 Fed. Reg. 13528, 13529 (May 22, 1973).

[28] *See* 37 Fed. Reg. 18289 (Sept. 9, 1972).

[29] 39 Fed. Reg. 12115 (April 3, 1974).

[30] 392 F. Supp. at 686.

[31] 40 Fed. Reg. 19766 (May 6, 1975).

their headwaters and all "primary" tributaries of such waters up to their headwaters.[32] By July of 1975, the Corps' published "interim final regulations" that selected the broadest possible regulatory approach to tributaries. In this rule, navigable waters were defined to include "All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark."[33] The preamble stated that "[w]ith respect to the inland areas of the country, Corps jurisdiction under Section 404 of the FWPCA would extend to . . . all tributaries (primary, secondary, tertiary, etc.) of navigable waters of the United States." The Corps' 1977 final regulations modified this definition of tributaries to exclude the headwater requirement.[34]

In 1978, keeping with this theme of ever-expanding regulation, EPA published proposed revisions to its definition of waters of the United States that would have broadened the 1973 definition to include additional waters.[35] The change was proposed "to more accurately reflect which waters are subject to the requirements of the Clean Water Act. Consistent with legislative history, judicial interpretations, and longstanding EPA policy, the term covers all waters which may be regulated by the Federal

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[32] 40 Fed. Reg., *supra*, at 19767.

[33] 40 Fed. Reg. 31320, 31323-24 (July 25, 1975).

[34] 42 Fed. Reg. 37122, 37144 (July 19, 1977).

[35] 43 Fed. Reg. 37078 (August 21, 1978).

Government within constitutional limits. . . ."[36] In 1982, the Corps' regulations were brought in line with EPA's.[37]

B. The Current Rule Impermissibly Continues to Regulate All Tributaries, Regardless of their Relationship to Downstream Navigable Waters

The blanket nature of the current tributary rule mirrors the now-discarded migratory bird rule that was at issue in *SWANCC*.[38] Like the tributary rule, the migratory bird rule was developed as a way to broadly identify any and all waters that Congress could conceivably regulate under its interstate commerce authority, regardless of navigability. Like the migratory bird rule, the tributary rule reaches too far.

First, there is no definition of "tributary" in the rules. Courts have been left to develop their own *ad hoc* definitions, of which *Deaton* is the latest. *See Headwaters, Inc. v. Talent Irrigation Dist.*[39] (quoting the dictionary definition of tributary as "a stream which contributes its flow to a larger stream or other body of water.") *Headwaters* and *Deaton* proceed from the assumption that blanket regulation of tributaries is permissible, and the only question is whether the drainage feature at issue is in fact a tributary. Yet the presumption itself – that all tributaries of navigable

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[36] *Id.* at 37079. *See also* 44 Fed. Reg. 32854, 32901 (June 7, 1979) (revised definition).

[37] 33 C.F.R. § 323.3(a)(5) (1982).

[38] 531 U.S. 163-164 (discussion of migratory bird rule).

[39] 243 F.3d 526, 533 (9th Cir. 2001).

waters, no matter how far removed, can be regulated – does not pass the "significant nexus" test of *SWANCC*.

Arizona has a single traditional navigable water, the Colorado River. All other waters in the state are regulated in some fashion through application of the tributary rule. Because there is no clear definition of when a "tributary" begins or ends, there is no limit to the reach of the Clean Water Act based on a federal nexus. The reach of the Clean Water Act, in the agency view, extends to the smallest ephemeral washes and roadside ditches. Furthermore, since "impoundments" of tributaries are in themselves jurisdictional waters, even stock tanks are covered.[40] This breadth and the lack of any functional definition of "tributary" makes the rule, like the migratory bird rule, a path to unlimited federal regulation. As such, it oversteps the same bounds exceeded by the migratory bird rule at issue in *SWANCC*.

C. Pollution Emanating from Ditches can be Controlled Without the Application of the Tributary Rule

The reason for asserting jurisdiction over non-navigable tributaries, and in fact the only reason plausible under *SWANCC*, is the need to "control pollutants at the source." *See, e.g., United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974) ("It would, of course, make a mockery of those powers if its authority to

[40] *See* U.S. Army Corps of Engineers South Pacific Division Administrative Appeal Decision, *Approved Jurisdictional Determination for The Valley Vista Property* (January 31, 2003).

control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste."); *Puerto Rico v. Alexander*, 438 F. Supp. 90 (D.D.C. 1977); *United States v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974). Yet in today's regulatory climate, discharge of pollutants through drainage ditches would be regulated regardless of the status of the ditches themselves.

Of critical importance is the Clean Water Act itself, which regulates the discharge of pollutants from "point sources" to waters of the United States. Expansive case law developed under the NPDES program clearly upholds the determination that a ditch, if it serves as a conduit for discharging pollutants into downstream waters, is considered a "point source." As such, the discharges are regulated under the NPDES program.

With regard to our homebuilding industry, for example, EPA also considers construction sites to be "point sources." Discharges leaving these sites that enter navigable waters are regulated under the Section 402 program.[41]

Moreover, dumping wastes on the ground *anywhere* is generally regulated under a host of federal, state and local regulations. In Arizona, a person who "discharges" is required to obtain an Aquifer Protection Permit (APP)

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[41] *See Sierra Club v. Abston Construction*, 620 F.2d 41, 45 (5th Cir. 1980) (graded land can be a point source); *see also* 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) (preamble to EPA storm water rule explaining broad reach of "point source").

from the Arizona Department of Environmental Quality (ADEQ).[42] "Discharge" is defined as the direct or indirect addition of a pollutant to waters of the state from a facility."[43] For the APP program, the term is further defined as the "addition of a pollutant from a facility either directly to an aquifer or to the land surface or the vadose zone in such a manner that there is a reasonable probability that the pollutant will reach an aquifer."[44]

The kind of pollution sought to be controlled by regulating a ditch as "waters of the United States" under the Clean Water Act is directly regulated by the State. Further, other types of polluting activities are also heavily regulated. For example, open dumping is generally prohibited under the Resource Conservation and Recovery Act (RCRA)[45] as well as by state and local solid waste regulation. Therefore, the premise that an expansive tributary rule is needed to control pollutants at the source is faulty.

IV. CONCLUSION

If tributary can be defined so broadly as to include the Deaton's drainage ditch, it might also be defined so broadly that virtually every parcel of private land in the State of Arizona will be classified as having a wash, a stock tank or an irrigation drainage ditch that is "tributary" to the Colorado River, a navigable stream. This type of micro-regulation of land use planning at the federal

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[42] ARIZ. REV. STAT. § 49-241(A).

[43] ARIZ. REV. STAT. ANN. § 49-201.12.

[44] *Id.*

[45] 42 U.S.C. §§ 6901-6992k.

level is unnecessary and inconsistent with the limitations Congress intended on the Clean Water Act as defined by this Court in the *SWANCC* decision.

This over regulation of land use by the federal agencies is having a direct impact on the affordability of housing in Arizona, where only 17% of the state's land base is in private ownership. On behalf of the home building industry in Arizona, HBACA asks this Court to issue a writ of certiorari and accept jurisdiction of this cause to reverse the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted this 30th day of January, 2004.

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